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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2226/2012*, **

<i>Communication submitted by:</i>	Shadurdy Uchetov (represented by counsel, Shane H. Brady)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Turkmenistan
<i>Date of communication:</i>	3 September 2012 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 7 December 2012 (not issued in document form)
<i>Date of adoption of Views:</i>	15 July 2016
<i>Subject matter:</i>	Conscientious objection to compulsory military service
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Freedom of conscience; inhuman or degrading treatment; deprivation of liberty; conditions of detention
<i>Articles of the Covenant:</i>	7, 10 (1) and 18 (1)
<i>Article of the Optional Protocol:</i>	5 (2) (b)

* Adopted by the Committee at its 117th session (20 June-15 July 2016).

** The following members of the Committee participated in the examination of the communication:
Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić,
Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Víctor Manuel Rodríguez-Rescia, Fabián Omar
Salvioli, Yuval Shany and Margo Waterval.
A joint opinion by Committee members Yuji Iwasawa and Yuval Shany is annexed to the present
Views.



1.1 The author of the communication is Shadurdy Uchetov, a national of Turkmenistan, born in 1988. He claims that the State party has violated his rights under articles 7 and 18 (1) of the Covenant. Although the author does not invoke article 10 of the Covenant specifically, the communication also appears to raise issues under that provision. The Optional Protocol entered into force for Turkmenistan on 1 August 1997. The author is represented by counsel, Shane H. Brady.

1.2 In his initial submission, the author requested that the Committee seek assurances from the State party that as an interim measure it would not subject him to a second criminal prosecution while his communication was pending before the Committee. On 7 December 2012, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided not to accede to that request.

The facts as submitted by the author

2.1 The author submits that he is a Jehovah's Witness. He has never been charged with a criminal or administrative offence other than his criminal conviction as a conscientious objector.

2.2 In the spring of 2006, he was called up by Dashoguz Regional Military Commissariat to perform his compulsory military service. In compliance with the summons, he met with representatives of the Military Commissariat and explained orally and in writing that as a Jehovah's Witness, his religious beliefs did not permit him to perform military service.¹ The author, however, expressed his willingness to perform alternative civilian service. His call-up was repeatedly deferred, but on 30 June 2009 he was charged under article 219 (1) of the Criminal Code² for refusing to perform military service.

2.3 On 13 July 2009, the author was tried before Dashoguz City Court. He explained that his religious beliefs as a Jehovah's Witness did not permit him to take up arms or learn warfare, and reiterated his willingness to fulfil his civil obligations by performing alternative civilian service. Dashoguz City Court convicted the author under article 219 (1) of the Criminal Code and sentenced him to 24 months of imprisonment, to be served in a general regime penitentiary. He was arrested in the courtroom.

2.4 On 11 August 2009, the Judicial Chamber for Criminal Cases of Dashoguz Regional Court rejected the author's appeal. The author's mother, at the request of her son, prepared a supervisory appeal to file with the Supreme Court of Turkmenistan. However, the administration of Dashoguz remand prison refused to provide the author with the text of the request for appeal in order for him to sign it. As a result, the time limit for filing a supervisory appeal expired. On 18 September 2009, the author's mother filed an application with the Prosecutor General of Turkmenistan requesting an extension of the time limit for filing a supervisory appeal with the Supreme Court. On 4 November 2009, the Prosecutor General's Office rejected that application, noting that there was no basis for reversing the court decision in that case.

¹ The Military Service and Military Duty Act does not recognize a person's right to exercise conscientious objection to military service and does not provide for any alternative military service. For recommendations received by Turkmenistan in the context of the Act, see, inter alia, the report of the Special Rapporteur on freedom of religion or belief on her mission to Turkmenistan (A/HRC/10/8/Add.4), para. 68, and the Committee's concluding observations on the initial report of Turkmenistan (CCPR/C/TKM/CO/1), para. 16.

² Article 219 (1) of the Criminal Code provides that evasion of the draft for military service in the absence of legal grounds for exemption from such service shall be punished with correctional labour for up to two years or imprisonment for up to two years.

2.5 After the author's arrest, he was initially detained for 34 days in a holding cell at the women's detention facility in Dashoguz. On 17 August 2009, he was transferred to the LBK-12 prison located near the town of Seydi and immediately placed in an isolation cell for 10 days.

2.6 Over the course of the author's imprisonment, he was placed in a punishment cell three times, each time for a period of three days. Although the official reason for his punishments was the alleged violation of prison rules, the author submits that in reality he was singled out for harsh treatment because of his religious beliefs as a Jehovah's Witness. While in the punishment cell, he was made to sleep on the bare concrete floor even in winter. On one occasion, the author was placed in a so-called "strict control ward" for a period of one month. The conditions of detention in that ward were the same as in the punishment cell, except that he was given a bed at 10 p.m. every day and fed three times a day. One day, seven or eight officers from the special police forces entered the ward wearing balaclavas. They questioned him about his beliefs and then repeatedly beat him with their batons, causing him serious head injuries. The prison authorities allowed his relatives to visit him once a month but they did not allow him visits from friends.

2.7 On 13 July 2011, the author was released from prison, but for the first two months after his release he was required to report regularly to Dashoguz Police Department. The author submits that he faces the prospect of being called up again for military service and being imprisoned as a conscientious objector.³

2.8 The author submits that he has exhausted all reasonable domestic remedies concerning his claim under article 18 (1) of the Covenant prior to filing his communication to the Committee. He adds that the courts in Turkmenistan have never ruled in favour of a conscientious objector to military service and that the justice system in Turkmenistan is perceived as being ineffective and lacking independence.⁴ As to the alleged violation of article 7 of the Covenant, the author maintains that there was no effective domestic remedy available to him. He refers to the concluding observations of the Committee against Torture on the initial report of Turkmenistan, in which the Committee expressed concern about the lack of an independent and effective complaint mechanism in the State party for receiving and conducting impartial and full investigations into allegations of torture, in particular of convicted prisoners and pretrial detainees (CAT/C/TKM/CO/1, para. 11 (a)).

The complaint

3.1 The author claims that his imprisonment on the ground of his genuinely held religious beliefs expressed in his conscientious objection to military service in itself constitutes inhuman or degrading treatment within the meaning of article 7 of the Covenant.

3.2 The author also claims a violation of article 7 of the Covenant because of his ill-treatment while in detention and because of the detention conditions in the LBK-12 prison. In that regard, he refers, inter alia, to the report of the Turkmenistan Independent Lawyers Association of February 2010, which noted that the LBK-12 prison was located in a desert where in winter, temperatures reached minus 20°C and in summer, 50°C. The prison was

³ Article 18 (4) of the Military Service and Military Duty Act permits repeated call-up for military service and stipulates that a person refusing military service is exempt from further call-up only after he has received and served two criminal sentences. See communication No. 2218/2012, *Abdullayev v. Turkmenistan*, Views adopted on 25 March 2015.

⁴ The author refers to the European Court of Human Rights, *Kolesnik v. Russia* (application No. 26876/08), judgment of 17 June 2010, paras. 54-58, 68, 69 and 73, and the concluding observations of the Committee against Torture on the initial report of Turkmenistan (CAT/C/TKM/CO/1), para. 10.

overcrowded, and prisoners infected with tuberculosis and skin diseases were kept together with healthy inmates. Although the author does not invoke it specifically, the communication also appears to raise issues under article 10 of the Covenant.

3.3 The author claims that his prosecution, conviction and imprisonment for refusing to perform compulsory military service owing to his religious beliefs and conscientious objection have violated his rights under article 18 (1) of the Covenant.⁵ He notes that he repeatedly informed the Turkmen authorities that he was willing to fulfil his civil duty by performing genuine alternative service; however, the State party's legislation does not provide for such an alternative.

3.4 The author requests that the Committee direct the State party to: (a) acquit him of the charges under article 219 (1) of the Criminal Code and expunge his criminal record; (b) provide him with appropriate compensation for the non-pecuniary damages suffered as a result of his conviction; and (c) provide him with appropriate monetary compensation for the legal expenses incurred in submitting his communication to the Committee.

State party's observations on admissibility and the merits

4. On 17 March 2014, the State party submitted its observations on admissibility and the merits of the communication. It informed the Committee that the author's case had been carefully considered by the relevant law enforcement bodies of Turkmenistan and no reason had been found to appeal the court's decision. The criminal offence committed by the author was determined accurately according to the Criminal Code of Turkmenistan. Under article 41 of the Constitution, protecting Turkmenistan was the sacred duty of every citizen, and general conscription was compulsory for male citizens. The author did not meet the criteria of persons eligible to be exempted from military service, as provided for under article 18 of the Military Service and Military Duty Act.⁶

Author's comments on the State party's observations

5.1 On 14 May 2014, the author submitted that, in its observations on admissibility and the merits, the State party had not disagreed with any of the facts set out in the communication. The only attempted justification raised by the State party had been its assertion that the author had been convicted as a conscientious objector to military service because he did not qualify for an exemption from military service under article 18 of the Military Service and Military Duty Act. According to the author, the State party's submission shows total disregard for its commitments under article 18 of the Covenant and the Committee's jurisprudence, which upholds the right to conscientious objection to

⁵ See, for example, communications Nos. 1853/2008 and 1854/2008, *Atasoy and Sarkut v. Turkey*, Views adopted on 29 March 2012, paras. 10.4 and 10.5.

⁶ Article 18 of the Military Service and Military Duty Act, as amended on 25 September 2010, stipulates that the following citizens shall be exempted from military service: (a) those who have been declared unfit for military service for health reasons; (b) those who have performed military service; (c) those who have performed military or another form of service in the armed forces of another State in accordance with international agreements entered into by Turkmenistan; (d) those who have been convicted twice of committing a minor crime or convicted of a crime of medium gravity, a grave crime or an especially grave crime; (e) citizens with an academic degree, approved in accordance with the legislation of Turkmenistan; (f) sons or brothers of those who died as a result of carrying out military duties during military service or military training; and (g) sons or brothers of those who, as a result of a disease contracted as a consequence of a wound or as a result of injury or contusion, have died within one year from the day of discharge from military service (after completion of military training) or of those who, as a result of performing military service, have become disabled during military service or military training.

military service. Furthermore, the State party had not contested the author's allegations that he had suffered inhuman and degrading treatment at the hands of law enforcement and prison officers, contrary to article 7 of the Covenant.

5.2 The author requests that the Committee conclude that his prosecution and conviction violated his rights under articles 7 and 18 (1) of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the case is admissible under the Optional Protocol.

6.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee recalls its jurisprudence to the effect that authors must avail themselves of all domestic remedies in order to fulfil the requirement of article 5 (2) (b) of the Optional Protocol, insofar as such remedies appear to be effective in the given case and are de facto available to the author.⁷ The Committee notes the author's assertion that there are no effective remedies available to him in the State party with regard to his claims under articles 7, 10 and 18 (1) of the Covenant.⁸ The Committee also notes the State party's assertion that the author's case had been carefully considered by the relevant law enforcement bodies of Turkmenistan and no reason had been found to appeal the court's decision, and that the State party has not contested the author's argumentation concerning the exhaustion of domestic remedies. In these circumstances, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the communication.

6.4 The Committee considers that the author's claims under articles 7, 10 and 18 (1) of the Covenant are sufficiently substantiated for the purposes of admissibility, declares them admissible and proceeds to their examination on the merits.

Consideration of the merits

7.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5 (1) of the Optional Protocol.

7.2 The Committee notes the author's claim that he was singled out for harsh treatment, such as placement in the isolation cell for 10 days immediately after his arrival at the LBK-12 prison, placement in a punishment cell on three occasions and beatings by officers from the special police forces while he was detained in the "strict control ward", because of his religious beliefs as a Jehovah's Witness. The State party has not refuted those allegations, nor provided any information in that respect. In the circumstances, due weight must be

⁷ See, for example, communication No. 2097/2011, *Timmer v. Netherlands*, Views adopted on 24 July 2014, para. 6.3.

⁸ See communications No. 2221/2012, *Mahmud Hudaybergenov v. Turkmenistan*, Views adopted on 29 October 2015, para. 6.3; No. 2222/2012, *Ahmet Hudaybergenov v. Turkmenistan*, Views adopted on 29 October 2015, para. 6.3; and No. 2223/2012, *Japparow v. Turkmenistan*, Views adopted on 29 October 2015, para. 6.3.

given to the author's claim. Accordingly, the Committee concludes that the facts as presented reveal a violation of the author's rights under article 7 of the Covenant.

7.3 The Committee notes the author's claims concerning the conditions he endured at the LBK-12 prison during his imprisonment from 17 August 2009 to 13 July 2011, including his confinement in a bare concrete cell as a method of punishment, and exposure to extreme heat in summer and extreme cold in winter. The Committee also notes that those allegations were not contested by the State party and that they are consistent with the findings of the Committee against Torture in its concluding observations on the initial report of the State party (CAT/C/TKM/CO/1, para. 19).

7.4 The Committee recalls that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; they must be treated in accordance with, *inter alia*, the Standard Minimum Rules for the Treatment of Prisoners.⁹ In the absence of any other pertinent information on file, the Committee decides that due weight must be given to the author's allegations. Accordingly, the Committee finds that confining the author in such conditions constitutes a violation of his right to be treated with humanity and with respect for the inherent dignity of the human person under article 10 (1) of the Covenant.¹⁰

7.5 The Committee notes the author's claim that his rights under article 18 (1) of the Covenant have been violated due to the absence in the State party of an alternative to compulsory military service, as a result of which his refusal to perform military service because of his religious beliefs led to his criminal prosecution and subsequent conviction. The Committee takes note of the State party's submission that the criminal offence committed by the author was determined accurately according to the Criminal Code of Turkmenistan, that pursuant to article 41 of the Constitution, the protection of Turkmenistan is the sacred duty of every citizen, and that general conscription is compulsory for male citizens.

7.6 The Committee recalls its general comment No. 22 (1993) on the right to freedom of thought, conscience and religion, in which it considers that the fundamental character of the freedoms enshrined in article 18 (1) is reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4 (2) of the Covenant. The Committee recalls its prior jurisprudence stating that although the Covenant does not explicitly refer to a right of conscientious objection, such a right derives from article 18, inasmuch as the obligation to be involved in the use of lethal force may seriously conflict with the freedom of thought, conscience and religion.¹¹ The right to conscientious objection to military service inheres in the right to freedom of thought, conscience and religion. It entitles any individual to an exemption from compulsory military service if such service cannot be reconciled with that individual's religion or beliefs. The right must not be impaired by coercion. A State may, if it wishes, compel the objector to undertake a civilian alternative to military service, outside the military sphere and not under military command.

⁹ See, for example, communication No. 1520/2006, *Mwamba v. Zambia*, Views adopted on 10 March 2010, para. 6.4.

¹⁰ See, for example, communications No. 1530/2006, *Bozbey v. Turkmenistan*, Views adopted on 27 October 2010, para. 7.3; and *Abdullayev v. Turkmenistan*, para. 7.3.

¹¹ See communications Nos. 1321/2004 and 1322/2004, *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea*, Views adopted on 3 November 2006, para. 8.3; No. 1786/2008, *Jong-nam Kim et al. v. Republic of Korea*, Views adopted on 25 October 2012, para. 7.3; *Atasoy and Sarkut v. Turkey*, paras. 10.4 and 10.5; No. 2179/2012, *Young-kwan Kim et al. v. Republic of Korea*, Views adopted on 15 October 2014, para. 7.4; *Abdullayev v. Turkmenistan*, para. 7.7; *Mahmud Hudaybergenov v. Turkmenistan*, para. 7.5; *Ahmet Hudaybergenov v. Turkmenistan*, para. 7.5; and *Japparow v. Turkmenistan*, para. 7.6.

The alternative service must not be of a punitive nature. It must be a real service to the community and compatible with respect for human rights.¹²

7.7 In the present case, the Committee considers that the author's refusal to be drafted for compulsory military service derives from his religious beliefs and that the author's subsequent conviction and sentence amounted to an infringement of his freedom of thought, conscience and religion in breach of article 18 (1) of the Covenant. In this context, the Committee recalls that repression of the refusal to be drafted for compulsory military service, exercised against persons whose conscience or religion prohibits the use of arms, is incompatible with article 18 (1) of the Covenant.¹³ It also recalls that during the consideration of the State party's initial report under article 40 of the Covenant, the Committee expressed its concern that the Military Service and Military Duty Act, as amended on 25 September 2010, does not recognize a person's right to exercise conscientious objection to military service and does not provide for any alternative military service, and recommended that the State party, *inter alia*, take all necessary measures to review its legislation with a view to providing for alternative service.¹⁴ Accordingly, the Committee finds that, by prosecuting and convicting the author for his refusal to perform compulsory military service due to his religious beliefs and conscientious objection, the State party has violated his rights under article 18 (1) of the Covenant.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation of the author's rights under articles 7, 10 (1) and 18 (1) of the Covenant.

9. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia*, to expunge the author's criminal record and to provide him with adequate compensation. The State party is also under an obligation to avoid similar violations of the Covenant in the future. In this connection, the Committee reiterates that the State party should revise its legislation in accordance with its obligation under article 2 (2) of the Covenant, in particular the Military Service and Military Duty Act, as amended on 25 September 2010, with a view to ensuring the effective guarantee of the right to conscientious objection under article 18 (1) of the Covenant.¹⁵

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.

¹² See communications Nos. 1642-1741/2007, *Min-Kyu Jeong et al. v. Republic of Korea*, Views adopted on 24 March 2011, para. 7.3; *Jong-nam Kim et al. v. Republic of Korea*, para. 7.4; *Abdullayev v. Turkmenistan*, para. 7.7; *Mahmud Hudaybergenov v. Turkmenistan*, para. 7.5; *Ahmet Hudaybergenov v. Turkmenistan*, para. 7.5; and *Japparow v. Turkmenistan*, para. 7.6.

¹³ See *Min-Kyu Jeong et al. v. Republic of Korea*, para. 7.4; *Jong-nam Kim et al. v. Republic of Korea*, para. 7.5; *Atasoy and Sarkut v. Turkey*, paras. 10.4 and 10.5; *Young-kwan Kim et al. v. Republic of Korea*, para. 7.4; *Abdullayev v. Turkmenistan*, para. 7.8; *Mahmud Hudaybergenov v. Turkmenistan*, para. 7.6; *Ahmet Hudaybergenov v. Turkmenistan*, para. 7.6; and *Japparow v. Turkmenistan*, para. 7.7.

¹⁴ See CCPR/C/TKM/CO/1, para. 16.

¹⁵ See communications No. 2019/2010, *Poplavny v. Belarus*, Views adopted on 5 November 2015, para. 10; and No. 1992/2010, *Sudalenko v. Belarus*, Views adopted on 27 March 2015, para. 10.



Annex

Joint opinion of Committee members Yuji Iwasawa and Yuval Shany (concurring)

We concur with the Committee's conclusion that the State party has violated the rights of the author under article 18 (1) of the Covenant, but for reasons different from the majority of the Committee.^a We will retain our reasoning even though we may not find it compelling to repeat it in future communications.

^a For details, see *Abdullayev v. Turkmenistan*, appendix I (joint opinion of Committee members Yuji Iwasawa, Anja Seibert-Fohr, Yuval Shany and Konstantine Vardzelashvili).